INDEX

AUTHORITIES

STATUTES:

CASES: Page

IN THE

Supreme Court of the United States

No. .....

S. J. Groves & Sons Company, *Petitioners,*

v.

Lindsay C. Warren, Comptroller General of the United States, *Respondent.*

PETITION OF S. J. GROVES & SONS COMPANY FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT ENTERED APRIL 19, 1943, BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AFFIRMING AN ORDER DATED NOVEMBER 4, 1942, BY THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA ENTERING SUMMARY JUDGMENT FOR THE RESPONDENT.

PETITIONER IN MIDST OF INTER-AGENCY JURISDICTIONAL DISPUTE.

Petitioner has been caught, to its great detriment, in the midst of a jurisdictional dispute between the Secretary of the Interior and his contracting officer on the one side (R-9-12, 12-19, 22-31) and the respondent Comptroller General on the other side (R-31-51)—the jurisdiction claimed by the Interior Department officials being contained in

Article 15 of a Government Standard Form of Contract similar to Article 15 of another Government Standard Form of Contract upheld and enforced by this Court in *Callahan-Walker Construction Company* v. *United States,* No. 65, decided November 9, 1942, following the rule applied in 1878 in *Kihlberg* v. *United States,* 97 U. S. 398, while the jurisdiction claimed notwithstanding by the respondent originated in the Act of March 3, 1817, 3 Stat., 366 and is now contained in Section 305 of the Budget and Accounting Act of 1921 (Tit. 31, Sec. 71 U. S. Code).

The courts below refused to exercise their judicial power to resolve this jurisdictional dispute between the officers of the two Government Agencies (R-52, . .).

OPINIONS BELOW.

The District Court of the United States for the District of Columbia filed a memorandum for the clerk of that Court which is in the record (R-52). The United States Court of Appeals filed an opinion of April 19, 1943, which is not yet reported but is in the record.

JURISDICTION.

The jurisdiction of this Court for a writ of certiorari to review the judgment of April 19, 1943, by the United States Court of Appeals is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C., 347).

QUESTIONS PRESENTED.

1. Whether a decision of a contracting officer, twice approved by the head of the department concerned under Articles 4 and 15 of the Standard Government Form of Contract, set forth in paragraph 3 of the Bill of Complaint (R-2) and admitted in the Answer (R-19), is binding upon the respondent Warren as Comptroller General of the United States and should be carried out by him as a ministerial duty, it having been held by this Court that the ac-

counting officers of the United States had no power over similar acts and duty of the officer in charge, in the expression of which there was no ambiguity, and were, therefore, conclusive in effect. *United States* v. *Mason & Hangar Company,* 260 U. S. 323, reaffirmed in 261 U. S. 610.

2. Whether the decision of a contracting officer pursuant to the terms of a lawful contract between the United States and the petitioner and the twice affirming decisions of the head of the department concerned, the Secretary of the Interior, which are made by the Contract final and conclusive on the parties, may be disregarded and interfered with by the respondent, as has been done in this case, when this Court as recently as its opinion of November 9, 1942, in *United States* v. *Callahan Walker Construction Company* has held, in effect, that decisions of the contracting officers of the United States under similar contract stipulations are conclusive and that even the United States Court of Claims may not disregard them.

3. Whether the respondent, as Comptroller General of the United States, has jurisdiction and authority of a discretionary character to refuse to be bound by administrative decisions of a contracting officer under contract stipulations similar to Articles 4 and 15 of this contract which this court has uniformly held, at least since *Kihlberg* v. *United States,* 97 U. S. 398 decided in 1878, to *United States* v. *Callahan Walker Construction Company,* No. 65, decided November 9, 1942, left no discretionary jurisdiction and authority in the courts to disregard them.

4. Whether the respondent, as Comptroller General of the United States, has discretionary jurisdiction and authority to disregard and refuse to be bound by numerous opinions and judgments of both this Court and the United States Court of Claims to the effect that similar decisions of contracting officers and/or heads of departments under similar stipulations in contracts with the United States are final and conclusive on both parties thereto.

5. Whether the law contemplates and requires that the respondent be permitted to disregard and refuse to carry out the lawful decisions of contracting officers rendered in accordance with the terms of contracts with the United States and compel contractors and the United States Government to undergo the expense and delays of suits against the United States merely to secure judicial affirmance of such decisions.

6. Whether the refusal of the respondent to carry out the decision of the contracting officer, twice affirmed by the head of the department concerned, was not arbitrary and capricious in view of the long line of decisions in both this Court and in the Court of Claims of the United States as to the conclusive effect of similar decisions of contracting officers under similar contract stipulations.

7. Whether there does exist as complete, speedy and inexpensive remedy in the United States Court of Claims for this petitioner as could be afforded by the proceedings in the courts below.

STATUTE INVOLVED.

The only statute involved is the present Section 305 of the Budget & Accounting Act of 1921 (Tit. 31, sec. 71, U. S. Code) originating in the Act of March 3, 1817, (3 Stat. 366) and carried forward as Section 236, Revised Statutes. The said Section 305 provides that:

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Account Office."

STATEMENT OF THE CASE.

The material and basic facts in this case are essentially undisputed and are contained in a decision dated September 5, 1941, by the contracting officer, which is attached to the Answer as Exhibit A (R-22, 31) and in affirming deci-

sions dated December 1, 1941, and June 27, 1942, by the Acting Secretary of the Interior which are attached to the Complaint as Exhibits A and B (R-12-19, 9-12), respectively. Also such facts are stated in the Complaint (R-1-9) and the material ones admitted in the Answer (R-19-22).

These facts are that the Interior Department advertised pursuant to Section 3709, Revised Statutes, for bids for the construction of an earth filled dam (a dam constructed of earth) at Grassy Lake, high in the mountains of Idaho. Prospective bidders were furnished with copies of the drawings, specifications, and results of certain borings made by the Government to determine the subsurface conditions. They were also warned to visit the site of the work. Representatives of the petitioner did visit the site of the work and there inquired of the Government Engineer as to the location of the "borrow pits"— the place from which the earth was to be secured for the construction of the dam— and this Government Engineer reported to his superior officers that:

> "At the time prospective bidders were looking over the work, all of us, including Messrs. Savage and Berkey, confidently expected that the ridge on which test pits 7, 8, and 28 to 32 were located would yield sufficient material to complete the dam."
>
> "If I were to testify on the matter, I would admit that the contractor was advised that we expected the ridge in question would yield substantially all of the required borrow material" (R-28-29).

Petitioner's bid, being the lowest responsible bid received, was accepted and contract 12r-6560, dated October 5, 1936, was entered into on a Standard U. S. Government Form No. PWA-51, for the construction of the dam (R-1). This contract form, with which the petitioner had nothing whatever to do in drafting, contained a considerable number of printed articles, among which are Articles 4 and 15 under which the administrative decisions of September 5, 1941, December 1, 1941, and June 27, 1942, were rendered by the

officers of the Interior Department authorized by the terms of the contract to do so.

The petitioner was at great expense and delay, during the short working season in the high altitude where the dam was constructed, in clearing the borrow pit site indicated, as above stated, by the Government Engineer, and in building roads from the borrow pit to the dam site. After the removal of a comparatively small amount of the top surface of the borrow pit area, the petitioner's representatives discovered the presence in large quantities of a very hard substance, known as Rhyolite, below the depth of the Government borings in said area (R-2-3). The presence of this material was called to the attention of the Government representatives, as provided in Article 4 of the Contract (R-2), and it was finally determined by the Interior Department that said Rhyolite was unsuitable for use in the construction of the dam (R-3).

The petitioner was required by the Government Engineer to move to another designated borrow pit area. This area had to be cleared, roads built, etc., only to find—after the excavation of a comparatively small amount of material—that a similar condition of unsuitable Rhyolite was present. Several successive areas were in turn designated by the Government Engineer as borrow pit areas, these areas were cleared, roads built, etc., and unsuitable Rhyolite was again discovered until finally a site was designated from which the necessary material was secured for the construction of the dam (R-3).

As stated in the opinion of the court below, the presence of unsuitable Rhyolite was seasonably brought to the attention of the Government engineer and finally the petitioner submitted a claim to the Government authorities for the excess costs incurred because of the unknown subsurface conditions—the unknown presence of Rhyolite in the borrow pit areas—and representing the expense of clearing the several sites, building roads, drainage, etc., except the first

site, necessary to make use of the designated sites as borrow pit areas. This claim for the increased costs was filed in accordance with the aforesaid Article 4 of the contract.

The work was completed in the autumn of 1939. The Government engineer on the job, in a letter of January 23, 1940, had refused to allow the petitioner any amount as excess costs. (R-22 for recitation of this fact). The petitioner by letter of February 19, 1940, appealed to the Secretary of the Interior from that decision, as provided in Article 15 of the contract (R-4). This appeal was forwarded to the contracting officer, who treated it as a claim and delayed until March 15, 1941, before rendering his decision refusing to allow the claim. This decision was appealed from, as provided in Article 15 of the contract, whereupon the contracting officer in his decision of September 5, 1941, (R-22, 31), modified his decision of March 15, 1941, which was approved in the decisions of December 1, 1941, and June 27, 1942, by the Acting Secretary of the Interior (R-12-19, 22-31).

Thereupon a voucher was prepared by the Interior Department for the amount of $23,615.70 which had been allowed. The petitioner agreed to accept such amount in settlement, and the voucher with copies of the decisions of September 5, 1941, by the contracting officer, and December 1, 1941, by the Secretary of Interior, was sent to the General Accounting Office for the issuance of a certificate on which a disbursing officer could issue a check in payment (R-5).

It had required from the autumn of 1939 to December, 1941, to get the claim to the General Accounting Office allowed in part, only, nothing being allowed on the claim for increased expense of $70,000.00 by reason of misrepresentation of the length of the working seasons (R-13). The voucher remained in that office, unacted upon, until March 23, 1942, when a letter, (R-31-46), of that date was sent by the respondent to the Secretary of the Interior questioning the correctness of the aforesaid decisions of September 5 and December 1, 1941.

In substance, this letter of March 23, 1942, from the respondent to the Secretary of the Interior, asserted that under paragraph 47 of the specifications attached to the contract (Quoted in Record, pp. 39-41) and under paragraph 37 of the specifications (also quoted in Record, pp. 41-42), the contractor was not entitled to any additional payment as excess costs for clearing, etc., successive borrow pit areas.

The Acting Secretary of the Interior replied in his letter of June 27, 1942, to the said letter of March 23, 1942, adhering to the conclusions reached in his decision of December 1, 1941, and in the contracting officer's decision of September 5, 1941 (R-9-12). This letter of March 23, 1942, from the respondent, and the reply of June 27, 1942, from the Secretary of the Interior, did not constitute "prolonged correspondence between respondent and the Secretary of the Interior" as stated by the court below in the first paragraph of its opinion.

Nevertheless the respondent refused to issue the certificate on which a check could be issued in payment of the amount allowed (R-46-51), These proceedings in the courts below followed. The petitioner set forth the facts in the bill of complaint and alleged therein that it had no adequate remedy in a suit against the United States to recover the said amount of $23,615.70 allowed by the contracting officer and the Secretary of the Interior because of a number of reasons, to wit:

1. The United States is now at war and officers and employees of the United States, having knowledge of the facts, are engaged in the war effort. They could not be secured as witnesses on behalf of the Government, with the result that the case would have to be postponed until they became available as witnesses, which will be after the present war is over at some indeterminate future date (R-7-8).

2. A judgment of the Court of Claims would be no more binding on the respondent than the decisions of the contracting officer and the head of the Department, and since the judgment would have to be certified to Congress for an appropriation with which to pay it, the respondent could arbitrarily and capriciously refuse to certify the judgment for payment.

3. Also under the procedure in the Court of Claims the evidence would have to be taken before Commissioners, transcribed by reporters, and the expense thereof would be very considerable (Tit. 28, Secs. 276 to 278 U. S. Code).

In addition to the costs of proceeding in the Court of Claims, there would necessarily have to be added to the delay since the autumn of 1939, when the work was completed, and the present delay of approximately three and one-half years, a further indeterminate delay in obtaining judgment and an appropriation from which to pay same as provided in the Act of April 27, 1904 (33 Stat. 422).

SPECIFICATION OF ERROR TO BE URGED.

The court below erred in failing to hold:

(1) That the respondent had only a ministerial duty to perform in certifying for payment the amount of $23,614.70 as allowed in the decisions of September 5, 1941, as affirmed in the decisions of December 1, 1941, and June 27, 1942, by the Secretary of the Interior, rendered in accordance with Articles 4 and 15 of the contract between the United States and petitioner which made such decisions final and conclusive on both parties to the contract—there being no suggestion of fraud or mistake in any of the three decisions or otherwise in the case.

(2) That the decision of respondent refusing to certify for payment the said amount of $23,615.70 as allowed by the contracting officer and twice approved in the decisions

of December 1, 1941 and June 27, 1942, by the Acting Secretary of the Interior was so grossly erroneous as to be arbitrary and capricious.

(3) That the ~~respondent~~ petitioner did not have an adequate remedy in any other court and by any other proceedings to secure prompt payment of the said amount of $23,615.70 and which payment had been delayed for more than three years at the time the complaint was filed.

(4) That the respondent did not have jurisdiction and authority to repudiate, ignore, and disregard the representations of the Government engineer at the site of the work as to the location of the borrow pit area from which the material would be secured for the dam and the benefit of which representations the United States presumably secured in the form of a lower contract price than would have been possible if the petitioner's representatives had believed at the time of bidding that the borrow material might be secured over a wide area.

REASONS FOR GRANTING THE WRIT.

1. This Court has held, at least since *Kihlberg* v. *United* States, 97 U. S. 398, 403, in 1878, to and including *United States* v. *Callahan Walker Construction Company,* No. 65, on November 9, 1942, that parties to a Government contract may stipulate that the decision of the contracting officer or some other designated official shall be final and conclusive on both parties to the contract; in *Globe Indemnity Company* v. *United States,* 291 U. S. 476, that the jurisdiction of the Comptroller General under Section 305 of the Budget and Accounting Act of 1921, is "precisely that which was previously exercised by the Accounting Office in the Treasury Department" and that said Budget and Accounting Act was not intended "to disturb this construction of the statute or to make final administrative determinations in the executive departments any the less final settlements:" and in *United States* v. *Mason & Hangar Company,* 260 U. S. 323, affirmed in 261 U. S. 610, that over

the effect of decisions of the contracting officer designated in the contract to decide disputes arising thereunder the Comptroller "has no power" and that such decisions of the contracting officer are "conclusive in effect."

However, this Court has not decided—but should decide and determine—the remedy of the innocent party, the contractor, when there is a dispute as to the areas of authority and jurisdiction exercised by the contracting officer and/or the head of the department concerned in rendering a decision under a contract having stipulations similar to Articles 4 and 15 of petitioner's contract and the area of authority claimed and exercised by the Comptroller General in refusing to be bound by such a decision and to carry it into effect by certifying for payment the amount allowed in such decisions of the contracting officer and/or the head of the department concerned.

2. The United States is now engaged in a great war. The Court may take judicial notice of the fact that the public debt limit has been increased to proportions hitherto unknown in the history of the United States Government. Literally thousands of contracts have been and will be entered into between the United States and private parties. The Standard Government Forms of both Construction and Supply Contracts contain stipulations similar to Article 15 of this contract and the construction contracts contain articles similar to Article 4 of this contract.

It is a question of the highest public importance that both Government officials and Government contractors shall know as expeditiously as possible whether the respondent Comptroller General has the jurisdiction and authority to disregard and refuse to carry out the decisions of contracting officers and/or heads of departments concerned under contract stipulations similar or identical with Articles 4 and 15 of the petitioner's contract.

3. The United States Court of Claims has repeatedly protested in its published decisions against the refusal of

the Comptrollers General to comply with, and carry out decisions of contracting officers and/or heads of departments concerned under similar contract stipulations making their decisions final and conclusive. *Penn Bridge Company* v. *United States,* 59 Ct. Cls., 892; *Albina Marine Iron Works* v. *United States,* 79 Ct. Cls., 714; *McShain Company* v. *United States,* 83 Ct. Cls., 405; *Sun Shipbuilding & Dry Dock Company* v. *United States,* 76 Ct. Cls., 154; *Phoenix Bridge Company* v. *United States,* 85 Ct. Cls., 626; *Cain Company* v. *United States,* 79 Ct. Cls., 290; *Rumsey* v. *United States,* 88 Ct. Cls., 254. See also the above cited decision of this Court in *Mason & Hangar Company* v. *United States,* 260 U. S. 323, affirmed in 261 U. S. 610.

Must that court continue to be burdened with such cases as this of petitioner's; the private parties forced to incur great delays and forced to incur great expense; and the United States Government placed to the expense of employing attorneys, paying their travel expenses, etc., in an attempt to defend cases decided by the contracting officers and/or heads of departments concerned and after this Court has decided that the decision of the officer authorized in the contract to make the decision under similar contract stipulations must be carried out in the absence of fraud or gross mistake?

The petitioner believes that neither the United States Government nor contractors may any longer afford the luxury of such useless litigation which could be avoided if the Comptrollers General would comply with the law.

4. The respondent has disregarded the opinions and judgments of both this Court and of the Court of Claims as to the conclusive effect of decisions of contracting officers and/or heads of departments concerned under similar contract stipulations.

Respectfully submitted,

O. R. McGuire,
O. R. McGuire, Jr.,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

No. .....

S. J. GROVES & SONS COMPANY, *Petitioners,*

v.

LINDSAY C. WARREN, Comptroller General of the United States, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

THE FACTS.

The petitioner relies upon the facts as summarized in the petition. A further statement of facts in the brief will not be made except where necessary to the argument on the law.

ARGUMENT.

I.

The Respondent had Only a Ministerial Duty to Perform in Issuing a Certificate for the Amount Allowed Petitioner in the Decision of the Contracting Officer, Affirmed by the Head of the Department in Accordance with the Applicable Terms of the Contract. The Refusal of the Respondent to Perform that Ministerial Duty was Arbitrary and Capricious.

(1)

Jurisdiction of accounting officers in settlement of claims unchanged since 1817.

The respondent acted, and could act only pursuant to Section 305 of the Budget and Accounting Act of 1921 (Tit. 31, Sec. 71, U. S. Code), which originated in the Act of March 3, 1817, (3 Stat. 366) and which was carried forward as Section 236, Revised Statutes. This Act of March 3, 1817, was one reorganizing the accounting system under

the Treasury Department, where it remained until the Budget and Accounting Act of 1921, created the General Accounting Office as one of several existing independent establishments not a part of the departments of government.

This history of the accounting system is referred to in *Globe Indemnity Company* v. *United States,* 291 U. S. 476 (1934) wherein, after quoting a part of this Section 305 of the Budget and Accounting Act, the Court stated that none of the duties of the Comptrollers General thereunder "were new." A similar conclusion was reached in *Penn Bridge Company* v. *United States,* 59 Ct. Cls. 892 (1924) wherein Judge Downey, a former Comptroller of the Treasury, wrote the opinion of the court.

Using the language of this Court in the *Globe Indemnity Company* case, "Before, as after, the Budget and Accounting Act, claims against the United States might be paid from the proper appropriation upon approval of the authorized officer of the department concerned, without settlement or audit by the accounting office" and that "none of these duties imposed upon the Comptroller General were new."

Therefore, the opinions and judgments of this court as to the finality of decisions of contracting officers under similar terms of Government contracts are equally applicable, whether such opinions and judgments were before or after the Budget and Accounting Act of 1921.

(2)

Conclusive effect of decisions of contracting officers.

The leading case in this matter is that of *Kihlberg* v. *United States,* 97 U. S. 398, 403 (1878) wherein the government contract for the transportation of Army supplies provided that payment on a mileage basis would be made "according to the distance from the place of departure to the place of delivery." The Government representative and the contractor agreed that the distances or mileage should be fixed by the Chief Quartermaster which should

govern in making payment for the transportation. The contractor disagreed with the distances fixed by the designated officer but this Court stated that the terms of the agreement:

> "* * * seem to be susceptible of no other interpretation than that the action of the Chief Quartermaster, in the matter of distances, was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part. The difference between his estimate of distances and the distances by air line, or by the road usually traveled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. *His action cannot, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract.* * * * If the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which the transportation was to be paid, disputes might have constantly arisen between the contractor and the Government, resulting in vexatious and expensive and, to the contractor oftentimes, ruinous litigation. * * *" (Italics supplied.)

This rule of the *Kihlberg* case has remained unchanged in this Court[1] and was recently applied by it in the opinion

---

[1] Sweeney v. United States, 109 U. S. 618; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549; *United States* v. *Gleason*, 175 U. S. 588; *United States* v. *Barlow*, 184 U. S. 588; *Ripley* v. *United States*, 223 U. S. 695); *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *Mason & Hangar Construction Company* v. *United States*, 260 U. S. 323, reaffirmed in 261 U. S. 610; *United States* v. *Northeastern Construction Company*, 260 U. S. 326.

These cases have been followed by the Court of Claims. Among others, see *Penn Bridge Company* v. *United States*, 59 Ct. Cls. 892; *McShain Company* v. *United States*, 83 Ct. Cls. 405; *Cain Company* v. *United States*, 79 Ct. Cls. 290; *Phoenix Bridge Co.* v. *United States*, 85 Ct. Cls. 626; *Rumsey* v. *United States*, 88 Ct. Cls., 254; *Dravo Corporation* v. *United States*, 93 Ct. Cls. 270.

Compare *Work* v. *Mosier*, 261 U. S. 352; *Work* v. *McAlester*, 262 U. S. 200; *Lane* v. *Hoglund*, 244 U. S. 174; *Ballinger* v. *Frost*, 216 U. S. 240; *Garfield* v. *Goldsby*, 211 U. S. 249; *Butterworth* v. *Hoe*, 112 U. S. 50; and *United States* v. *Schurz*, 102 U. S. 378.

of November 9, 1942, in *United States* v. *Callahan Walker Construction Company,* No. 65. This case concerned a dispute as to what constituted an "equitable adjustment" under a Standard Form of Government Construction Contract containing an Article 15 almost identical with the Article 15 of the contract between petitioner and the United States with the exception that in the *Callahan Walker Consruction Company* contract the authority of the contracting officer and the head of the department was limited to the decision of "disputes concerning questions of fact arising under this contract" while in the petitioner's contract the authority and jurisdiction of the contracting officer and the head of the department are not so limited, but broadly include "disputes concerning questions arising under this contract" (R-2).

The Court of Claims had given judgment for the *Callahan Walker Construction Company* that the decision of the contracting officer, which was not appealed to the head of the department concerned, as to the amount of the equitable adjustment by reason of changes under the contract, which was unacceptable to the contractor, did not constitute the decision of a dispute concerning a question of fact, as provided in the contract, but constituted a question of law. This court held otherwise and reversed the Court of Claims, stating that if the contracting officer erroneously decided the dispute, the contract provided the only avenue of relief; that is, by way of appeal to the head of the department under the terms of Article 15 thereof.

In this case, the petitioner has the decision of September 5, 1941, from the contracting officer that there were unknown subsurface conditions at the site of the work of an unusual nature differing materially from those ordinarily encountered in the work of constructing an earth-filled dam

and that the excess costs by reason thereof was $23,615.70 (R-22-31). Due to the fact that this decision was rendered by the contracting officer after the petitioner's appeal had been filed with the head of the department, under Article 15 of the contract, the Acting Secretary of the Interior rendered his decision of December 1, 1941, thereon with both the contracting officer's decisions and the appeal before him. He affirmed this decision of September 5, 1941, by the contracting officer (R-12-19). Later, with the respondent's objecting letter of March 23, 1942, before him the Acting Secretary of the Interior rendered his further decision of June 27, 1942, reaffirming the contracting officer's decision of September 5, 1941, and adhering to the conclusions stated in the prior decision of December 1, 1941 (9-12).

(3)

Both contracting officer and head of department decided in favor of Petitioner.

In addition to having decisions in his favor by both the contracting officer and the head of the department concerned, as provided in the contract, the petitioner has an Article 15 in his contract which does not limit the authority and jurisdiction of these officers to questions of fact, as did the corresponding Article 15 in the *Callahan Walker Construction Company* case.

The Court of Claims attempted by its holding in the *Callahan Walker* case to give relief to the contractor notwithstanding the adverse decision of the contracting officer by concluding that what he decided with respect to an equitable adjustment in the contract price was a question of law.

This court having concluded that the question was one of fact, was not required to decide whether the contract could have provided that the contracting officer should also decide disputes concerning questions of law arising under the contract with the same conclusiveness as he could

decide questions of fact. Petitioner's contract specifically provides that the contracting officer shall decide "all other disputes concerning questions arising under this contract" except where otherwise specifically provided. The petitioner's contract certainly includes any disputes concerning questions of law as well as of fact arising under the contract.

However, the questions which did arise under the petitioner's contract and the questions which the contracting officer decided were strictly questions of fact, namely, whether there were unknown subsurfaces or latent conditions at the site of an unusual nature differing materially from those ordinarily encountered in building earth-filled dams and if so, what amount of increase or decrease in the contract price should be made. In this respect the disputed question which arose and which was decided differed not at all from the questions which were decided in the *Kihlberg* and in the *Callahan Walker Construction Company* cases and in numerous other cases in this Court, some of which have been collected in a footnote on Page 15 of this brief.

(4)

This court has made no distinction between questions of law and questions of fact being left in the contract to decision of the contracting officer.

The case of *Mason & Hangar Company* v. *United States*, 56 Ct. Cls., 238, affirmed as *United States* v. *Mason & Hangar*, 260 U. S. 323, and upon rehearing again affirmed in 261 U. S. 610, very definitely involved a decision by a contracting officer of a question of law under a contract stipulation similar to Article 15 of petitioner's contract.[2]

The facts in that case are more fully stated in the report of the case in the Court of Claims. It there appears that

---

[2] The conclusive effect of the contracting officer's decision under the contract stipulation is as if a statute had provided therefor. See *United States* v. *Babcock*, 250 U. S. 328, 331; *United States* v. *Williams*, 278 U. S. 257, *Dismukes* v. *United States*, 297 U. S. 167, 171.

the former Comptroller of the Treasury had refused to pay, or approve payment of premiums for surety bonds of cost-plus contractors during the first World War. The contract provided that the contractor should be reimbursed "its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer," including "such bonds, fire, liability and other insurance as the contracting officer may approve or require."

The said Comptroller of the Treasury held that the surety bond was one required by law (namely, the Heard Act which was involved in *United States* v. *Globe Indemnity Company*, 291 U. S. 476), not one required in the discretion of the contracting officer and that, notwithstanding the decision and approval of the contracting officer that the premium on the bond should be reimbursed to the contractor as a part of the cost under the contract, the payment could not be made. Both this Court and the Court of Claims held that the decision of the contracting officer was conclusive, this Court saying:

> "There were such decisions and settlement, and payment, in consequence of them, as we have seen. Over the effect of these the Comptroller of the Treasury has no power. They were the acts and duty of the officer in charge, in the expression of which there was no ambiguity, and were, therefore, conclusive in effect."

It is too clear for serious argument that the decision of the contracting officer in that case involved a question of law, not one of fact. It appears from the opinion of this Court that the conflicting contentions of law were set forth therein but the Court said:

> "We are, however, not called upon to pass upon the conflicting contentions. The contract contains other provisions that determine the liability of the Government."

The Government sought, and the Court granted a rehearing in the case and upon the rehearing the former

opinions, as well as the judgments, were affirmed in 261 U. S. 610.

In *John McShain, Inc.* v. *United States,* 88 Ct. Cls., 284, the Court of Claims attempted to apply the *Davis* case, 82 Ct. Cls., 334, as it did in the *Callahan* case, 91 Ct. Cls., 538, to reverse a decision of a contracting officer; that is, by holding that such decisions involved questions of law in the construction of the contract. This Court in *United States* v. *John McShain, Inc.,* 308 U. S. 511-512, reversed that part of the judgment below.

It thus seems clear that this Court has held that the decisions of a contracting officer as to both questions of law and of fact have the same final and conclusive effect under Government stipulations, such as we have here, even on the United States Court of Claims whose statutory jurisdiction (Tit. 28, Sec. 250, U. S. Code) is much broader than that contained in Section 305 of the Budget and Accounting Act.

On principle, there appears no basis for making any distinction between the conclusive effect of decisions of contracting officers, whether they involve questions of law or of fact or both, if the contract stipulation is not limited to decisions of questions of fact—as was done in the *Callahan Walker Construction Company* contract but which was not done in petitioner's contract.

(5)

Even if the respondent in the issuance of a certificate must decide questions of law, that is no defense to this action.

If, as we contend, the decision of the contracting officer, twice affirmed by the head of the department in this case involved simply questions of fact as to whether there were unknown latent or subsurface conditions at the site of the work within the terms of Article 4 of the contract and as to the amount thereof, the decisions were final and conclusive under Article 15 on the respondent and he had but a ministerial duty to perform.

If, as apparently held by the court below, the issuance of the certificate on which a check could be issued in payment of the amount allowed by the contracting officer and twice affirmed by the head of department, involved a question of law for the respondent to determine, the court erred in its apparent conclusion that a Government contract could not leave to the contracting officer the conclusive determination of questions of law, as petitioner's contract most certainly attempted to do. The opinions and judgments of this court in the above cited *Mason & Hangar* case in 260 U. S. 323 and 261 U. S. 610, and the *John McShain* case in 308 U. S. 520, 521 were to the contrary.

Further, the Court of Claims has upheld such decisions. In *Dravo Corporation* v. *United States,* 93 Ct. Cls., 270, decided subsequent to the *Callahan Walker* case, 91 Ct. Cls., 538, that court had before it a contract containing an Article 15 identical with the Article 15 in petitioner's case. The dispute decided by the contracting officer in the *Dravo* case was one concerning a question of law. The court upheld the decision of the contracting officer as being one in the exclusive discretion of the officer authorized by Article 15 of the contract to decide the dispute.

This Court has not upheld the defense in proceedings for a summary writ that the Government official had to interpret the law. The case of *United States ex rel Parish* v. *MacVeagh,* 214 U. S. 124, reversed 30 App. D. C., 45 arose while the accounting offices were in the Treasury Department, and it was their duty to make the settlement. The proceeding was against the Secretary as the head of the department, but it in fact involved a dispute between a Treasury Auditor and the Treasury Comptroller. In that case the Treasury was authorized and directed by a private act of Congress to settle and adjust a claim. The Auditor had allowed it but the Comptroller had refused to approve the allowance. In the summary of the argument on behalf of the Secretary, as contained in the official report of the case, it appears that an attempt was made to establish that

he had a discretionary duty to perform. Unquestionably there was a requirement to weigh some evidence and to interpret the statute. Nevertheless, this Court held that the summary writ of mandamus should be issued to require the allowance of the claim as it had been stated by the Auditor.

The case of *Roberts* v. *United States ex rel Valentine,* 176 U. S. 219, 221, was one where the summary writ of mandamus was issued against the Treasurer of the United States to require him to pay interest on certificates which had been issued by the Board of Audit of the District of Columbia. The defense was made that the duty devolving on the Treasurer was a discretionary one but the court decided that the act was ministerial:

> "* * * although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of the writ is very greatly impaired. Every executive officer, whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

The full, complete and conclusive authority of the contracting Officer and/or the head of the department to decide all disputed questions, whether of law or fact, arising under a contract, could hardly be stated more clearly and plainly than it was stated in Article 15 of this contract and that conclusive authority could not be more plainly upheld than it has been upheld in the above cited cases in this Court involving similar contract stipulations.

The duty upon the respondent to issue a certificate on which a check could be issued involved no more discretion than was involved in the case of *Kendall* v. *United States ex rel Stockes*, 12 Peters, 524, where the duty required of the Postmaster General, and enforced by mandamus, was to credit on the books of his department, for the benefit of the contractor, a balance which had been determined by another official in another department. There the books were kept in the Post Office Department, as the court pointed out. Here the certificates on which checks may be drawn in payment of claims are issued in the office of respondent.[3]

Wright v. *Ynchausti*, 272 U. S. 640, and *Minila* v. *Rosadas*, 274 U. S. 410, were both proceedings against the former auditor for the Philippine Government to require him to pay certain claims allowed by other legal authority. The statute under which this auditor operated was enacted by Congress and modeled on the Act of July 31, 1894, under which the former accounting officers of the Treasury functioned at the time the Budget and Accounting Act of 1921 became law. Notwithstanding the Auditor claimed he was exercising discretion in interpreting the law, the judgments of this Court in both of these cases supports the position of petitioner that the respondent had but a ministerial duty to perform.

(6)

There was a gross abuse of any discretion the respondent may have had in the premises.

In addition to the above cited cases of this Court as to the conclusive effect of the decisions by contracting officers of disputes arising under Government contracts containing stipulations similar to Article 15 of this contract and the two opinions of this court in the *Mason & Hangar* case as to the lack of power of the chief accounting officer over such decisions, the Court of Claims has several times reversed his settlements refusing to carry out similar deci-

[3] Compare *Lower* v. *United States ex rel Marcy*, 91 U. S. 536.

sions of contracting officers and has pointedly advised him that such action "was without legal authority" in *McShain Co.* v. *United States,* 83 Ct. Cls., 405; "was without warrant of law" in *Albina Marine Iron Works* v. *United States,* 79 Ct. Cls., 714; that the "judgment and approval" of the contracting officer was exclusive in *Sun Shipbuilding & Dry Dock Company* v. *United States,* 76 Ct. Cls., 154; and that the "General Accounting Office was without jurisdiction to consider it" in *Rumsey* v. *United States,* 88 Ct. Cls., 254. Yet the respondent ignored all of these pointed judicial utterances and is attempting to force the respondent into the Court of Claims when it must be realized by all concerned that the said court could do nothing more under the controlling cases than to enter judgment upholding the decisions of the contracting officer and the head of department in this case.

Surely these judicial utterances and warnings in similar cases to the respondent or his predecessors in Office have at least equal weight with the opinion of the Attorney General of the United States in 20 Opins. Att. Gen. 626, with which the Panama Canal Auditor—whose accounts were settled by the accounting officers of the Treasury (See Executive Order quoted on Page 754 of *Smith* v. *Jackson,* 241 Fed. 747, 777)—refused to comply because of a contrary decision by the Comptroller of the Treasury, which the Auditor claimed precluded the courts from granting the summary writ (See 241 Fed. at page 757). The controversy was brought to this Court in *Smith* v. *Jackson,* 246 U. S. 388. In affirming the grant of the summary writ of mandamus, notwithstanding the Comptroller's decision, this Court said:

> "While it is apparent that this ruling [the Attorney General's] should have put the subject at rest, obviously the misconception of the Auditor as to the nature of his powers prevented that result from being accomplished. * * *
>
> "The expense of printing a voluminous record has been occasioned and the views of the Auditor have been

pressed upon us in a printed argument of more than one hundred pages. We think, however, that we need not follow or discuss that argument, as we are of the opinion that it is obvious on the face of the statement of the case that the Auditor had no power to refuse to carry out the law and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General and, second, beyond all possible question to the judgments of the court below. It follows, therefore, that the prosecution of the writ of error from this court constituted a plain abuse by the Auditor of his administrative discretion. In an ordinary case the situation would be one not only justifying but making it our duty to direct the enforcement of Rule 23 as to damages."

If this were a case of first impression and if the rule had not been so uniformly upheld by this Court since the *Kihlberg* case in 1878 that the decisions of contracting officers, rendered in good faith and without fraud or collusion or gross mistake, were final and binding on all concerned, including contractors, courts, and the accounting officers of the Government and if the Court of Claims, by way of protest in its opinions at the useless work thrown upon it, had not advised the respondent's predecessors in office that refusal to carry out such decisions were without warrant of law, contrary to law, etc., there might be some excuse for the action taken by respondent in this case.

However, it is the belief of the petitioner that the time has come to end this long continued practice of the Accounting Office, as illustrated in this case, to disregard the decisions of contracting officers and heads of departments under Article 15 of this and similar Government contracts and thus save the courts useless work and both the contractors and the Government large amounts of time and expense.

In view of the vast number of both construction and supply contracts entered into during this war by the United States on the Standard Government Forms of Contracts, containing Articles similar to Article 15 in this Contract,

these burdens on the courts and on both the United States and contractors will be increased to astronomical proportions if this Court does not settle this jurisdictional dispute between the respondent and the contracting officers and/or heads of departments.

Apparently in view of the disregard of respondent of the opinions of this Court in the *Mason & Hangar Company* case, particularly, and in other cases from *Kihlberg* v. *United States,* in 1878 to the *Callahan Walker Construction Company* case in 1942 the jurisdictional dispute between respondent and contracting officers apparently can not be settled in a suit against the United States. The situation is much more serious than was the one in the above referred to in *Smith* v. *Jackson.* It is believed that it can only be settled by means of a summary rule against the respondent with imposition of costs which the Court considered in *Smith* v. *Jackson.*

II.

The Courts Have the Judicial Power to Grant the Relief Prayed for in this Case and the Relief is not Adequate Which the Petitioner Could Secure in a Suit Against the United States.

This point would seem to be established by *Miguel* v. *McCarl,* 291 U. S. 441; *McCarl* v. *Cox,* 56 App. D. C. 27, certiorari denied, 270 U. S. 652; *Baker* v. *McCarl,* 58 App. D. C. 69; *McCarl* v. *Wylly,* 5 Fed. (2nd) 897; and *Smith* v. *Jackson, supra; McCarl* v. *Halstead,* 59 App. D. C., 395; *McCarl* v. *United States ex rel Societa Liquire di Armamento,* 58 App. D. C. 319.

In each and every one of these cases a suit could have been maintained against the United States in the Court of Claims and in each and every one of the cases the respondent Comptroller General had to make a legal determination and to some extent, at least, weigh the evidence in the respective cases. But the courts granted summary relief

and save for the case of *Miguel* v. *McCarl,* the respondent Comptroller General's action was based on the above quoted Section 305 of the Budget and Accounting Act. Also, except in the *Miguel* and *di Armamento* cases the men seeking relief by means of the summary procedure were claimed by the Comptroller General to be indebted to the United States and in addition to his jurisdiction under Sec. 305 of the Budget and Accounting Act, he was required by law to superintend the collection of debts to the United States (Tit. 31, Sec. 93 U. S. Code).

In the *Miguel* case a majority of the Court could not agree to issue the summary writ against the respondent McCarl because the Finance Officer had submitted the question to the Comptroller General for decision, in accordance with statutory procedure followed by the Auditor in *Smith* v. *Jackson, supra.* The Court did, however, hold that the right of Miguel was so plainly fixed by statute as to be free from doubt and equivalent to a positive command which could not be "affected by a contrary decision of the Comptroller General," saying:

> "* * * the mandatory injunction to Coleman should issue directing a disposal of petitioner's application for pay upon the merits, unaffected by the opinion of the Comptroller General, and in conformity with the views expressed in this opinion as to the proper interpretation and application of the pertinent statutes, a writ in that form is better suited to the circumstances than that indicated by the Supreme Court of the District."

As indicating the respect which this Court considered its opinions entitled to from the Comptroller General, the Court further said in the *Miguel* case that:

> "But it is not to be supposed that upon having his attention called to our decision, the Comptroller General will care to retain possession of the voucher or that he will interfere in any way with its payment."

The legal rights of the petitioner in this case were no less certainly determined and fixed by Articles 4 and 15 of the contract and the three concurring decisions thereunder by the Acting Secretary of the Interior and the contracting officer than were the rights of Miguel determined and fixed by the applicable statutes. There is, however, this difference that the statutes in the *Miguel* case had not been repeatedly interpreted in opinions of this Court or by any other court as have the rights of contractors and the jurisdiction of contracting officers and/or heads of departments under contracts having stipulations therein similar to Article 15 of this contract.

(1)

The remedy of a suit in the Court of Claims is not adequate.

Whether it should be the law or not, the fact is that this Court and the Court of Claims have repeatedly held that the decisions of contracting officers and/or heads of departments concerned under Government contracts having articles similar to Article 15 of this contract are final and conclusive on the United States, contractors, and the courts except in instances of fraud or gross mistake and neither has been alleged by the respondent in his answer in this case.

In other words the courts have entered judgments in accordance with such decisions of contracting officers whether they were for or against the United States, thereby reversing the Comptrollers General when they had refused to carry out decisions of contracting officers and/or heads of departments which were in favor of the contractors. Presumably this long established rule of decision would be applied in this case in event suit had been or is instituted against the United States. The petitioner was not indebted to the United States and had no fear of a counter-claim being filed against it in event of such a suit as might have been done in the above referred to *Smith* v. *Jackson, McCarl* v. *Wylly, McCarl* v. *Cox, Baker* v. *McCarl* and other cases.

However, the remedy by such a suit is not adequate in this case. The petitioner completed its work under the contract in the autumn of 1939, or nearly four years ago. Approximately two of these years were consumed in securing the decisions of the contracting officer and the head of the department. While the settlement certificate issued by respondent is undated, (R-46) it was certainly subsequent to the second decision by the Acting Secretary of the Interior dated June 27, 1942 (R-9). It is alleged in the bill that this settlement is dated August 20, 1942 (-6). The bill was filed August 25, 1942. Thus at the time the bill was filed the petitioner had been delayed more than two and a half years in securing payments of its out-of-pocket expenditures because of the admittedly unknown subsurface or latent conditions at the site of the work. Even if the suit against the United States in this case could be heard while we are engaged in this war and witnesses having knowledge of the facts are not engaged in essential war work on behalf of the United States, the necessary delay of securing judgment and in securing an appropriation with which to pay the judgment and in securing a certificate from the respondent on which a check could be drawn in payment of the judgment would at least double the delay which has occurred.

Such long delays are not only a serious matter in obtaining recoupment of petitioner's out-of-pocket expenses but further expenses in substantial amounts would have to be incurred for the travel expenses and per diems of witnesses to appear before a Commissioner of the Court of Claims for the purpose of giving their testimony; expenditures would have to be made for printing the petition and briefs, and for the transcribing of the testimony before the Commissioner. Much greater time would be required of petitioner's counsel and his charges would necessarily have to be higher than if the case were determined in a summary proceeding.

(2)

Judicial power may be fully and adequately exercised on the record in the case.

The allegations in the bill of complaint, to the extent they are admitted in the answer and the three decisions by the Interior Department officials under Articles 4 and 15 of the contract and the letter of the respondent to the Secretary of the Interior as well as his settlement—all of which are contained in the record—fully and completely present the legal issue which the respondent has raised in the case as well as the disputed question of jurisdiction between the Interior Department officials, on the one side, and the respondent Comptroller General, on the other side.

The case made calls for, and the circumstances require, the exercise of judicial power as it was exercised in *Smith* v. *Jackson, Miguel* v. *McCarl, Manila* v. *Posadas, Wright* v. *Ynchausti, Roberts* v. *United States ex rel Valentine, Kendall* v. *United States ex rel Stokes, United States ex rel Parish* v. *MacVeagh,* all hereinbefore cited. Also, *Noble* v. *Union River Logging Railroad Company,* 147 U. S. 123.

III.

There is no Merit in the Position of the Respondent and in the Conclusion of the Court Below to the Effect that the Respondent Had a Discretionary Duty to Perform in the Issuance of the Certificate on Which a Check Could be Drawn in Payment of the Amount Allowed by the Contracting Officer and the Head of his Department in Accordance with the Terms of the Contract.

With all due respect to the court below and to the respondent, the latter raised the dispute and jurisdictional issue between him and the Interior Department officials when he manufactured the issue that under paragraphs 37 and 47 of the specifications (R-39-42) the respondent was entitled to no adjustment under Article 4 of the contract because of the discovery at the site of the work and below

the bottom of the test pits, dug by the Government, the unknown condition of the presence of Rhyolite unsuitable for use in constructing the dam.

Petitioner believes that the Acting Secretary of the Interior fully and completely, in his letter of June 27, 1942, (R-9-12), demolished that alleged legal issue when it was put to him in the letter of March 23, 1942, by the respondent (R-31-46). Both the contract and the specifications were drafted by the Government and in accordance with long settled rules of interpretation any uncertainties in these documents must be resolved against the Government. Also, if possible, the contract and specifications should be interpreted so as to raise no conflict in their terms.

But as the Acting Secretary pointed out in his said letter of June 27, 1942, the position of the respondent would create an uncertainty amounting to the reading out of Article 4 of the Contract the stipulation that in event unknown subsurface or latent conditions of an unusual nature are discovered at the site of the work, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character required by the contract, there would be an adjustment in the contract price.

It is admitted by the decisions of the Interior Department officials and by the statements quoted therein from their representatives on the job that the presence of Rhyolite at the site of the work was unknown to them; that the presence of Rhyolite was not a condition generally recognized as inhering in construction of earth-filled dams; and that representatives of petitioner were advised before the bid was submitted that the necessary earth for the dam would be obtained in a particular area designated by the Government Engineer to these representatives of petitioner.

The respondent would repudiate the designation of the area for the borrow pit made by the Government Engineer to petitioner's representatives before the bid was submitted and the contract entered into and would require the con-

tractor to absorb the additional costs in grubbing and clearing successive borrow pit areas, etc., when the first and succeeding ones, except the last one designated, were found to contain Rhyolite unknown to either the Government or petitioner's representatives.

In order to work such an injustice on the petitioner, the respondent would create a conflict between Article 4 of the contract and the said paragraphs 37 and 47 of the specifications and read out of the said Article 4 of the contract a stipulation placed therein for just such a situation as developed in this case. Also, in order to accomplish this, the respondent would seize and exercise the jurisdiction conferred by Articles 4 and 15 of the contract on the contracting officer and the head of the Interior Department, advised by their engineers highly trained in this character of work.

Whatever else it may be called, this action on the part of respondent can not be considered the exercise of a legal discretion, particularly in view of the many decisions of this Court and of the Court of Claims as to the binding effect of the decisions of contracting officers and/or heads of departments under corresponding stipulations in Government contracts. The petitioner believes that such action by respondent was arbitrary and capricious, as hereinbefore stated.

CONCLUSION.

Upon the whole case it is submitted that the petition for certiorari should be granted and the judgment of the court below reversed with the imposition of all costs on the respondent.

Respectfully submitted,

O. R. McGuire,
O. R. McGuire, Jr.,
Attorneys for Petitioner.

April 30, 1943.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 977

S. J. GROVES & SONS COMPANY, PETITIONER

v.

LINDSAY C. WARREN, COMPTROLLER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 55–58) is not yet officially reported. The District Court of the United States for the District of Columbia filed only a memorandum for the Clerk (R. 52).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered April 19, 1943 (R. 59). The petition for a writ of certiorari was filed April 29, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Comptroller General of the United States is subject to a mandatory injunction compelling him to authorize payment of a claim for additional compensation under a contract with the United States, where a department head generally authorized by the contract to settle all disputes arising thereunder has approved the claim and submitted it to the Comptroller General for payment, but the latter has declined to authorize its payment on the grounds that the claim in question is invalidated by express specific stipulations in the contract, and that as to a substantial part of the claim the department head's decision is without any supporting finding.

STATUTE INVOLVED

The only statute bearing on the case is the Budget and Accounting Act of 1921, the relevant portions of which are set forth in Appendix A, *infra,* p. 27.

STATEMENT

This case arose when petitioner's claim for additional compensation under a Government contract for the construction of a dam was allowed by the Secretary of the Interior in the amount of $23,615.70 and certified by him to respondent, the Comptroller General of the United States, for direct settlement. Respondent found generally that the Secretary had overlooked certain clauses in the contract which defeated petitioner's right

to any compensation beyond the contract price, and that as to about 50% of the claim the Secretary's decision was without any supporting finding. Respondent accordingly advised petitioner that no balance was due. Petitioner then sought a mandatory injunction in the United States District Court for the District of Columbia, restraining respondent from interfering with payment of the sum allowed by the Secretary and ordering him to certify the claim for payment.

The contract in question, entered into on October 5, 1936, between petitioner and the United States, acting through the Bureau of Reclamation, Department of the Interior, called for the construction of the Grassy Lake Dam, on the Upper Snake River, Idaho, at stated unit prices (R. 1, 12–13). The contract included the following general provisions:

> ARTICLE 4. Changed conditions. Should the contractor encounter, or the Government discover, during the progress of the work subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The con-

tracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and (or) difference in time resulting from such conditions. [R. 14–15.]

ARTICLE 15. Disputes. All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meanwhile the contractor shall diligently proceed with the work. [R. 2.]

In 1934–1935, prior to the award of the contract, an exploration of the dam site had been conducted under the direction of an assistant geologist in the Interior Department, and eighteen test pits were dug in an area known as "borrow pit No. 1" situated about half a mile from the dam site (R. 15, 16, 28, 48). The geologist reported his belief that the explorations had disclosed suitable material for the necessary earth-

fill for the dam in "borrow pit No. 1" (R. 15, 28). At the time when prospective bidders were examining the site, the Government engineers advised petitioner of their expectation that "borrow pit No. 1" would yield "substantially all the required borrow material" (R. 15).

The location, depths, and logs of the test pits dug in "borrow pit No. 1" were shown in Drawing 42–D–44, which was attached to the contract specifications (R. 16, 28–29). Paragraph 27 of these specifications stated (R. 48):

> 27. Records of test pits and borings. The drawings included in these specifications show the available records of test pits dug and borings made at or near the dam site. The Government does not guarantee any interpretation of these records or the correctness of any information shown on the drawings relative to geological conditions. Bidders and the contractor must assume all responsibility for deductions and conclusions as to the nature of the rock and other materials to be excavated, the difficulties of making and maintaining the required excavations and of doing other work affected by the geology of the site of the work, and for the final preparation of the foundations for the dam and other structures.

Two other paragraphs of the specifications, 37 and 47, dealt specifically with borrow pits. Paragraph 37 declared:

37. Clearing. The area to be occupied by the dam and the surface of all borrow pits, structure sites, and quarries shall be cleared of all trees, stumps, roots, brush, and rubbish, and the cleared materials shall be burned or otherwise disposed of in a manner satisfactory to the contracting officer. Piling and burning shall be done in accordance with the provisions of paragraph 34. The cost of clearing shall be included in the unit prices bid for the other work in the schedule and no additional allowance will be made to the contractor on account of any amount of such clearing which may be required. [R. 42.]

And Paragraph 47, provided among other things, the following:

47. Borrow pits. All materials required for the construction of the dam embankment and for backfill, which are not available from required excavations, shall be taken from borrow pits as directed by the contracting officer. The location and extent of all borrow pits shall be as directed by the contracting officer, and the Government reserves the right to change the location of such borrow pits or to locate additional borrow pits as required, but such pits will be located as close as feasible to the work in which the borrowed materials are to be used. The limit of the average free haul for materials excavated from borrow pits for the earth-fill portions of the embankment will be 3000 feet, and for

the rock-fill and riprap portions will be 2000 feet. Actual required average haul of earth-fill material in excess of 3000 feet, and of rock-fill and riprap material in excess of 2000 feet will be paid for at $0.002 per cubic yard per 100-foot station. * * * Borrow pit areas shall be cleared as provided in paragraph 37. * * * If materials unsuitable for embankment or backfill purposes are found in borrow pits, such materials shall be left in place or excavated and wasted, as directed by the contracting officer, and payment for excavation and disposal of unsuitable materials excavated and wasted by direction of the contracting officer will be made at the unit price per cubic yard bid in the schedule for "Excavation, stripping borrow pits." Payment for excavation in borrow pits and transportation to embankment will be made at the unit prices per cubic yard bid therefor in the schedule, which unit prices shall include the entire cost of the excavation of the materials and of the transportation of the materials to the dam embankment: *Provided,* That all materials from borrow pits actually placed in the embankment or in backfill will again be included for payment under appropriate items of embankment construction or backfill. Measurement, for payment, of excavation in borrow pits will be made in excavation only and to the neat lines of excavations made

530126—43——2

> by direction of the contracting officer. [R. 39–41.] [1]

In addition, paragraph 33 of the specifications provided in part:

> No payment will be made to the contractor by the Government for any work done in constructing, improving, repairing, or maintaining any road, highway, or structure thereon for use in the performance of the work under these specifications. [R. 44.]

In the course of its work, petitioner opened a borrow pit in the location known as "borrow pit No. 1," but encountered large quantities of rhyolite, a hard volcanic substance, when it dug below the depths of the previous Government borings in the area (R. 2–3, 16). While the test borings had not been deep enough to reveal the presence of rhyolite in "borrow pit No. 1," that substance had been found in the test pits dug at the dam site, about half a mile away, and this had been shown on Drawing No. 4, the log of the test pits at the dam foundation (R. 27). The discovery of rhyolite in "borrow pit No. 1" was brought to the attention of the Government engineer in charge of the construction, who sent samples of the material to the Bureau of Reclamation office in Denver, which, after tests, reported that it was unsuitable for use in the dam (R. 3).

[1] This specification is set out in full in Appendix B, *infra*. The other specifications referred to in the statement are quoted in the text to the full extent shown by the record.

As a result, in order to obtain the remainder of the required embankment material, petitioner was forced to open three additional and more distant borrow pits, as located by the Government contracting officer, in two of which rhyolite was also found (R. 3–4, 16, 33). All work under the contract was satisfactorily completed on October 14, 1939 (R. 13).

The Government construction engineer refused to allow petitioner any increased costs for its borrow pit difficulties (R. 4), and on February 19, 1940, petitioner filed a claim with the contracting officer for additional compensation of $98,057.70 (R. 4, 23, 32–33). Of the total claimed, the sum of $23,615.70 was for extra costs incurred in locating the various borrow pits—clearing and draining them, and constructing haul roads thereto—on the ground that the unexpected discovery of rhyolite in "borrow pit No. 1" established a changed condition within the meaning of Article 4 of the contract (R. 31, 32, 33–34).[2]

[2] This claim for $23,615.70 was comprised of the following items (R. 31):

Clearing and grubbing of areas not originally designated as borrow pits	$5,881.00
Expense of providing drainage for borrow pits	2,731.05
Expenses in constructing haul roads to additional borrow pits	3,435.65
Extra costs incurred due to general borrow pit conditions	11,568.00
	$23,615.70

The last listed general item of $11,568.00 apparently represented excess costs allegedly incurred due to general moisture conditions encountered in "borrow pits 1–A and 1–B" (R. 44).

On March 15, 1941, the contracting officer, who was the Chief Engineer of the Reclamation Bureau at Denver, Colorado (R. 14, 22, 31), entered findings of fact and recommended denial of the claims *in toto* (R. 13, 22–23).

In connection with the claim for $23,615.70 based on the additional borrow pits, the contracting officer found that there was no misrepresentation in the specifications since it was conceded that "all rhyolite was encountered below the depths of the borrow-area test pits shown on the drawings" and "borrow pit conditions are not defined in the specifications" (R. 26). He also found that the presence of rhyolite "cannot be considered as an unusual condition" because it was shown in the log of test pits of the dam foundations, and the contractor might have assumed from this that such a formation extended at various depths beyond the limits of the dam's foundation (R. 27). As to the portions of the borrow pit claim which were based upon drainage and the "general borrow pit conditions" (see note 2, *supra*), the contracting officer found (R. 44):

> The specifications do not describe or define underground or moisture conditions in borrow pits, or climatic, or precipitation conditions at the site of the work. The logs of test pits attached to the specifications show the depths at which ground water was encountered in the borrow areas. Para-

> graph 27 of the specifications places the responsibility for any deductions and conclusions as to the nature of the materials to be excavated and the difficulties of making and maintaining the required excavations upon the contractor.

Disallowance of the claim was accordingly recommended on the grounds (1) that subsurface conditions did not differ materially from those shown on the drawings or indicated in the specifications (R. 25, 36), (2) that paragraph 47 of the specifications (see pp. 6–8, *supra*) expressly authorized the Government engineer to locate additional borrow pits whenever necessary to obtain borrow material for the embankment and bankfill, and (3) that the contract contained no provision authorizing extra payment for the work in question (R. 36–37).[3]

On March 21, 1941, petitioner appealed from this decision to the Secretary of the Interior, who referred the matter back to the contracting officer (R. 23). After obtaining the comments of the two principal Government engineers on the project concerning the statements submitted by

[3] Of the remaining $74,442 in claim, $4,442 was asked for changed subsurface conditions "encountered at the north abutment of the dam" (R. 23, 32) and $70,000 was claimed as damage resulting from the Government's alleged misrepresentation as to the length of the working season (R. 23, 32–33). Both items were denied by the contracting officer (R. 26, 35–36). Neither of these items is involved in the case at bar.

petitioner on the appeal, the contracting officer rendered a report to the Secretary on September 5, 1941, reconsidering the matter (R. 22–24, 30). The report dealt at length with the claim for $23,615.70, allegedly due for the borrow pit work (R. 24–31), and held that while the Government's senior engineer had "definitely assured" prospective bidders that "borrow pit No. 1" would furnish all needed borrow material, his "opinions or expectations * * * cannot be deemed representations amounting to a warranty" (R. 24–25). The report then declared that "the geological data supplied by the Government were true and accurate" and reaffirmed his original finding that the subsurface conditions encountered were not materially different from those shown on the drawings or indicated in the specifications (R. 25). Continuing, the report recognized that the contract (paragraph 27) placed the responsibility for deductions drawn from the geological data upon the contractor and reserved to the Government the right to locate additional borrow pits (paragraph 47), and that in borrow pit excavation the occurrence of unsatisfactory and unexpected materials was common and was generally at the risk of the contractor (R. 29, 30).

However, the report concluded that an adjustment was warranted in this case, in the light of "its own peculiar facts," under the clause of Article 4 referring to "unknown conditions of an

unusual nature," for the reason that "there existed such certainty (based on the geological data obtained) in the minds of both the contracting parties" that borrow pit No. 1 would yield the necessary materials (R. 30). The report accordingly recommended payment as requested (see n. 2, *supra*), of the items comprising the claim of $23,615.70 for additional borrow pit costs.

Thereafter, on December 1, 1941, the Acting Secretary of the Interior entered findings of fact allowing the contractor's appeal to the extent of $23,615.70, for increased costs incurred in the borrow pit operations (R. 12–19). The allowance was made under the same clause of Article 4 invoked in the contracting officer's supplementary report, but upon a somewhat different rationale (R. 18–19):

> It is not clear that the conditions encountered by the contractor in the borrow pit operations were "conditions at the site materially differing from those shown on the drawings or indicated in the specifications," within the meaning of article 4 of the contract. The question remains, however, whether they constituted "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," within the meaning of the same article. * * *

> While the occurrence of the rhyolite in itself clearly was an unknown condition, this fact need not be controlling. Rather, the significant fact is that after its discovery there was a determination that, by reason of its presence, the borrow materials would be unusable. In the circumstances, including the various preliminary tests made as to the borrow materials and the materials likely to be found in the general area, and the opinion of those qualified to judge the suitability of the borrow area, this subsequent determination must be regarded as unusual. I therefore find that, within the meaning of article 4 of the contract, the contractor encountered unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications.

No mention was made in the Acting Secretary's findings of the pertinency of Paragraphs 27, 33, 37, and 47 of the specifications (see pp. 5–8, *supra*).

The Bureau of Reclamation thereafter sent the claim to the Comptroller General for settlement in the amount of $23,615.70 (R. 31–32). In a letter of March 23, 1942, to the Secretary of the Interior, extensively analyzing the contract and the history of the claim, the Comptroller General questioned the Government's liability to pay the claim and requested that the Department recon-

sider the matter (R. 31–46). The Comptroller General took the position that the claim in question was governed not by Article 4 of the contract, but rather by the specific provisions of paragraph 47 of the specifications, which contemplated that unknown and unsuitable materials might be discovered in the borrow pits (R. 42–43). More particularly, the Comptroller General's letter challenged on the following grounds the Government's liability for the particular items comprising the borrow pit claim:

(*a*) The item of $5,881 for "clearing and grubbing areas not originally designated as borrow pits," on the ground that paragraphs 47 and 37 of the specifications plainly required the cost of clearing to be included in the unit prices bid for the work and expressly denied any additional allowance therefor to the contractor (R. 43);

(*b*) The item of $3,435.65 for "constructing roads to additional borrow pits," on the grounds that paragraph 33 of the specifications expressly negatived any payment for work done in "constructing * * * any road * * * for use in the performance of the work under these specifications," and that paragraph 47 declared that the unit prices bid for borrow pit excavation "and transportation to embankment * * * shall include the entire cost of the excavation * * * and * * * transportation of the materials to the dam embankment" (R. 43–44);

(*c*) The items of $2,731.05 for "providing drainage for borrow pits" and of $11,568 for the general moisture conditions encountered therein, on the grounds that paragraph 47 made no provision for payment on this account and that there was no basis for reimbursement under Article 4, because the contracting officer had expressly found, on September 15, 1941, that such conditions were not changed conditions within the meaning of Article 4 of the contract, and there was no specific contrary finding by the Acting Secretary that the expense in question was due to conditions differing from those indicated in the drawings or specification or to "unknown conditions of an unusual nature" etc., as requred by Article 4 (R. 45).

In a letter to the Comptroller General dated June 27, 1942, the Acting Secretary of the Interior reaffirmed his prior view that the claim should be paid (R. 9–12), arguing that Article 4 and paragraph 47, when read together, meant "that the Government may designate the location of such borrow pits as may be required," but that once a pit was located the contractor was entitled to use it to an extent "reasonably contemplated by both parties," and to extra compensation if a later move was necessitated because of "conditions within the meaning of Article 4" (R. 11).

Subsequently the Comptroller General sent petitioner a "settlement certificate" denying the claim on the grounds indicated in his letter of March

23, 1942, to the Secretary of the Interior (R. 46–51). On August 25, 1942, petitioner brought suit for a mandatory injunction in the District Court of the United States for the District of Columbia (R. 1–9). Respondent answered (R. 19–51) and moved for summary judgment (R. 51). On November 4, 1942, the court granted the motion and entered judgment for respondent, holding that respondent's action was "discretionary, not ministerial" and within the scope of his authority, that petitioner's right under the contract was "doubtful" and that petitioner had a "proper remedy in the Court of Claims" (R. 52). On appeal, the United States Court of Appeals for the District of Columbia affirmed (R. 55–58), holding that respondent had questioned the decision of the Acting Secretary on an issue of law and that there was enough doubt as to the extent to which respondent was concluded by the departmental rulings on a legal issue, by virtue of Article 15 of the contract, that it "ought not to be decided in a summary action" (R. 58).

ARGUMENT

Petitioner's argument in substance is this: Article 15 of its contract, with exceptions which are immaterial here, committed the decision of "all * * * disputes concerning questions arising under this contract" to the contracting officer subject to appeal to the head of the depart-

ment; prior decisions of this Court have recognized the effectiveness of such stipulations both as to disputes involving questions of fact and questions of law; accordingly once the Acting Secretary had approved petitioner's claim, respondent's sole authority was to certify it for payment, notwithstanding Section 305 of the Budget and Accounting Act of 1921 (31 U. S. C. § 71) which provides for the settlement and adjustment by respondent's office of "all claims and demands whatever by the Government of the United States or against it."

We express no opinion here as to the ultimate propriety of respondent's reversal of the Acting Secretary's disposition of petitioner's claim or as to the ultimate correctness of his construction of the contract, for none is necessary. The scope of the inquiry in this case is only to determine whether upon the Acting Secretary's submission of the claim for settlement respondent became subject to a duty to certify it for payment "so plainly prescribed as to be free from doubt and equivalent to a positive command" and therefore "so far ministerial that its performance may be compelled by mandamus." *Miguel* v. *McCarl,* 291 U. S. 442, 454, quoting *Wilbur* v. *United States,* 281 U. S. 206, 218–219. As both lower courts correctly held, petitioner did not establish the existence of so clear a duty in this case.

1. While it is true that the decisions of this Court recognize the effectiveness of contractual

stipulations providing for the finality of departmental decisions, the rule of finality is qualified and not sufficiently absolute to turn respondent's powers of settlement under the 1921 Act into a merely ministerial function upon receipt of petitioner's claim.[4] Thus the departmental decision does not control if it is so grossly erroneous as to impute fraud or bad faith (see *Ripley* v. *United States,* 223 U. S. 695, 704), or if it is manifestly contrary to the provisions of the contract (*Smith* v. *United States,* 256 U. S. 12, 16–17; *Penker Construction Company* v. *United States,* 96 C. Cls. 1, 39, 41; *Arundel Corporation* v. *United States,* 96 C. Cls. 77, 79–80, 113–115; cf. *De Groot* v. *United States,* 5 Wall. 419), or if it is without any supporting evidence or finding (*Smith* v. *United States, supra,* at 15–16; *B–W Construction Company* v. *United States,* No. 43925, C. Cls., decided October 5, 1942, slipsheet pp. 21–22, 27; *Ira J. Lyons* v. *United States,* No. 45215, C. Cls., decided March 1, 1943; cf. *United States* v. *Ross,* 92 U. S. 281; *United States* v. *Clark,* 94 U. S. 73; 96 U. S. 37). The latter two qualifications were the very grounds assigned by respondent for his refusal to accept the departmental decision in the case at bar (see pp. 15–16, *supra*). Respondent's decision was thus in an area " 'involving the character of judgment or discretion,' the exercise of which will not be compelled by mandamus." *United States ex*

[4] "The mandatory injunction herein prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations." *Miguel* v. *McCarl,* 291 U. S. 442, 452.

rel. Giraud Co. v. *Helvering,* 301 U. S. 540, 543. And, of course, the remedy sought being extraordinary, "whether he decided right or wrong, is not the question." *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324.[5]

2. Petitioner points to no statute creating the asserted ministerial duty in terms "so clear and precise" as to require no construction (cf. *Miguel* v. *McCarl,* 291 U. S. 442, 453, 454).[6] Instead, petitioner seeks to establish the ministerial nature of respondent's function in this case in reliance upon Article 15 of the contract and decisions of this Court, all on the merits, in cases involving the rights of parties under similar contractual provisions. But this Court long ago resisted an attempt to construct mandamus upon a framework of this character, and indeed a stronger one than petitioner shows here. In *United States* v. *Lynch,* 137 U. S. 280, an attempt was likewise

[5] Assuming *arguendo* that respondent's decision was erroneous, it was clearly not arbitrary. Compare *MacArthur Bros. Co.* v. *United States,* 258 U. S. 6; *Alex Ranieri* v. *United States,* 96 C. Cls. 494, certiorari denied, 317 U. S. 690, rehearing denied, 317 U. S. 713—both relied on by respondent in making his decision (R. 45, 49, 51); see also *Adams* v. *Nagle,* 303 U. S. 532, 542–543.

[6] Indeed, standing alone the basic legislation detailing the functions of the General Accounting Office, particularly Sections 304 and 305 of the Budget and Accounting Act of 1921 (set out, *infra,* p. 27), would indicate the contrary. Cf. *Lambert Lumber Co.* v. *Jones Engineering & Construction Co.,* 47 F. (2d) 74, 80–82, 85 (C. C. A. 8), certiorari denied, 283 U. S. 842. See *Globe Indemnity Co.* v. *United States,* 291 U. S. 476, 480.

made to enforce a claim against the United States by mandamus against its fiscal officers, and it was urged in support of the writ that previous expressions of this Court established the merits of the claim. This Court, however, denied the writ, holding that its previous decisions would establish at best only an erroneous determination by the fiscal officer and not his lack of authority to pass upon the claim. Significantly, the Court disposed of the case without finding it necessary to inquire into the validity of the petitioner's contention that the Court's prior construction of the very statute upon which his claim rested established the merits of the claim beyond dispute. Sound considerations of policy support the Court's approach in the *Lynch* case, at least as a general proposition. The disposition of claims against the Government *via* extraordinary process should hardly be rested upon the nice questions concerning the precise meaning of judicial opinions which would inevitably arise were mandamus made generally available upon the basis urged here. Compare *Brashear* v. *Mason,* 6 How. 92, 102.

In any event, the *Lynch* case should be followed here. As the court below held (R. 58), the controversy between respondent and the Acting Secretary as to whether petitioner's claim was governed by Article 4 or specification 47 involves a question of law. Relying primarily on *United States* v. *Mason & Hangar Co.,* 260 U. S. 323, affirmed 261 U. S. 610, and *United States* v. *John*

McShain, Inc., 308 U. S. 512–513, 520, petitioner maintains that even as to such questions, respondent was so plainly concluded by the Acting Secretary's decision by virtue of Article 15 of the contract that his sole function was to perform the ministerial duty of certifying payment. Even if this be their sound ultimate import, certainly neither of these decisions, nor any of the others cited by petitioner, purports to define so completely the scope of the finality of departmental decisions on questions of law, under such a clause as Article 15, as to exclude a decision by respondent involving the " 'character of judgment or discretion,' the exercise of which will not be compelled by mandamus" (see p. 19, *supra*).

Moreover, none of the decisions relied on by petitioner decided that, as a matter of interpretation, Article 15 of the present contract was intended to require finality of departmental decision on every question of law arising under the contract.[7] Contrast *United States* v. *Babcock*, 250

[7] In *United States* v. *John McShain, Inc.*, *supra*, the only decision of this Court in any way involving the instant Article 15, the Government argued at p. 10 of its brief that under Article 15 the departmental interpretation of plans and drawings was final, but the Government also relied on Section 25 of the specifications which so provided specifically. Thus the Court was not required to construe Article 15 at all, and its reliance in the *per curiam* decision on cases not involving Article 15 may indicate that it was not construing Article 15 but instead was upholding the validity of the unambiguous, specific finality provision of Section 25.

U. S. 328, 331. Quite recently the Court of Claims has said of an identical Article 15 in another contract that: "We think that disputes, as to which the contracting officers' decision is final and conclusive, should be narrowly limited" (*Penker Construction Company* v. *United States,* 96 C. Cls. 1, 37), and has construed the provision to require finality of departmental decision as to what work the contract requires to be done, but not as to what sum shall be paid for it (*ibid.,* p. 38–39). And in another case that court questioned the competency of the parties to a Government contract to stipulate at all for the decision by the contracting officer of all disputes involving questions of law. See *Callahan Construction Company* v. *United States,* 91 C. Cls. 538, 616. See also *Arthur W. Langevin* v. *United States,* No. 43903, C. Cls., decided May 3, 1943, slipsheet pp. 13–14; *English Construction Co.* v. *United States,* 29 F. Supp. 526, 527, 531 (Del.). As the court below concluded (R. 58), such expressions demonstrate the existence of sufficient "room for difference of opinion" concerning the meaning of Article 15 to defeat petitioner's right to the relief it seeks. Cf. *Ness* v. *Fisher,* 223 U. S. 683, 691; *United States ex rel. Chicago Great Western Railroad Co.* v. *Interstate Commerce Commission,* 294 U. S. 50, 54.[8]

[8] It is not necessary for present purposes to endorse the soundness of such expressions. It is sufficient that they indicate that the principles urged by petitioner have not been so

3. The Court of Claims is concededly open to petitioner. And while this may not always make mandamus inappropriate (cf. *Miguel* v. *McCarl*, 291 U. S. 442, 455), in the circumstances of this case to try petitioner's right to payment here "is to make the writ of mandamus serve the purpose of an ordinary suit and to depart from the settled rule that the writ of mandamus may not be employed to secure the adjudication of a disputed right for which an ordinary suit affords a remedy equally adequate, and complete." *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 544.[9]

---

unequivocally established as to expose respondent to summary process.

The circumspection with which this Court itself has handled the question of departmental finality on questions of law is illustrated by the most recent case in which it had occasion to consider the question—*United States* v. *Callahan Walker Construction Co.*, 317 U. S. 56 (not the same as the *Callahan Construction Co.* case, cited to the text, *supra*). On appeal from a judgment of the Court of Claims reversing a decision by the contracting officers, the Government urged that it was immaterial whether the dispute in question involved factual issues or, as the lower court held, legal issues, since the dispute in question was such that the contracting officer's decision was conclusive under the contract in either case. See Brief for the United States in No. 65, this Term, pp. 31–34. However, while reversing the Court of Claims, this Court inquired as to the precise nature of the dispute, held that it was factual, and refrained from commenting upon the Government's argument that the departmental decision was equally conclusive whether the dispute was factual or legal.

[9] There is no merit in petitioner's contention that it has no other adequate remedy. While admitting it can resort to

In any event, since mandamus issues only in the Court's discretion, there being no unqualified right to the writ even to compel the performance of a ministerial duty (*Redfield* v. *Windom,* 137 U. S. 636, 644–645; *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 311–312; *In re Cohen,* 107 F. (2d) 881, 883 (C. C. A. 5)), the court's self-imposed restraint against judicial "interference * * * with the performance of the ordinary duties of the executive departments of the government" (*Decatur* v. *Paulding,* 14 Pet. 496, 516; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 131, 132) is peculiarly apropos in a case where the petitioner has another adequate remedy.

---

the Court of Claims, petitioner urges the inadequacy of a proceeding in that forum on grounds of delay and expense. But if such considerations of convenience can suffice to establish the unavailability of other remedies, little remains of the basic principle that extraordinary process will be denied if relief can be otherwise secured. Cf. *Ex parte Perry,* 102 U. S. 183, 186; *United States* v. *Lynch,* 137 U. S. 280, 287. Nor is there any merit in the suggestion that if the writ is not issued and petitioner obtains a judgment in the Court of Claims, respondent may then decline to certify the judgment to Congress for appropriation (Pet. 9). Should the Comptroller General decline to pay any such judgment from an available appropriation (31 U. S. C. 225), it would be the function of the Secretary of the Treasury to certify the judgment to Congress for appropriation (31 U. S. C. 226). In any event, mandamus does not issue "in anticipation of an omission of duty." Ex *parte Cutting,* 94 U. S. 14, 20; cf. *Miguel* v. *McCarl, supra,* at p. 456.

CONCLUSION

There is no conflict and the decision of the court below is clearly correct. The petition for a writ of certiorari should accordingly be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
VALENTINE BROOKES,
K. NORMAN DIAMOND,
Attorneys.

MAY 1943.

APPENDIX A

Sections 304 and 305 of the Budget and Accounting Act are as follows (as they appear in Title 31, U. S. Code):

SECTION 74. * * * Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement.

The General Accounting Office shall preserve, with their vouchers and certificates, all accounts which have been finally adjusted.

Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement.

SECTION 71. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

APPENDIX B

Paragraph 47 of the specifications in petitioner's contract provides as follows:

> 47. *Borrow pits.*—All materials required for the construction of the dam embankment and for backfill, which are not available from required excavations, shall be taken from borrow pits as directed by the contracting officer. The location and extent of all borrow pits shall be as directed by the contracting officer, and the Government reserves the right to change the location of such borrow pits or to locate additional borrow pits as required, but such pits will be located as close as feasible to the work in which the borrowed materials are to be used. The limit of the average free haul for materials excavated from borrow pits for the earth-fill portion of the embankment will be 3,000 feet, and for the rock-fill and riprap portions will be 2,000 feet. Actual required average haul of earth-fill material in excess of 3,000 feet, and of rock-fill and riprap material in excess of 2,000 feet will be paid for at $0.002 per cubic yard per 100-foot station. The amount of overhaul in station cubic yards for which payment will be made will be determined by multiplying the excess of the average actual required haul in stations over the specified average free haul in stations, by the number of cubic yards of all such material excavated from borrow pits and placed in the embankment or used for back-fill, as directed or approved by the contracting officer. The lengths of haul

will be measured along horizontal straight lines between the centers of gravity of the materials as found in excavation in the borrow pits and the center of gravity of the completed dam embankment. No progress payment will be made for overhaul, but all overhaul earnings under the contract will be included in the final estimate. Borrow pit areas shall be cleared as provided in paragraph 37. Borrow pits shall be operated so as not to mar the usefulness or appearance of any part of the work or of any other property of the Government, and borrow pits and the surfaces of wasted material shall be left in a reasonably smooth and even condition satisfactory to the contracting officer. Should any borrow pits be located adjacent to the dam and below the level of the top of the dam, a berm of not less than 100 feet shall be left between the toe of the dam and edge of the borrow pit, with provision for a side slope of 4 to 1 to the bottom of the borrow pit. In order to avoid the formation of pools, drainage ditches from borrow pits to the nearest outlets shall be constructed by the contractor where, in the opinion of the contracting officer, such drainage ditches are necessary. The contractor shall carefully strip the sites of borrow pits, or so much thereof as may be required, of top soil, vegetation, roots, brush, sod, loam, and other objectionable matter. The disposal of all materials wasted by stripping shall be subject to the approval of the contracting officer. Measurement for payment for stripping borrow pits will be made in excavation and will include only the stripping in locations and to the depths as directed by the contracting officer. Payment for stripping

and disposal of materials wasted by stripping will be made at the unit price per cubic yard bid in the schedule for "Excavation, stripping borrow pits." If materials unsuitable for embankment or backfill purposes are found in borrow pits, such materials shall be left in place or excavated and wasted, as directed by the contracting officer, and payment for excavation and disposal of unsuitable materials excavated and wasted by direction of the contracting officer will be made at the unit price per cubic yard bid in the schedule for "Excavation, stripping borrow pits." Payment for excavation in borrow pits and transportation to embankment will be made at the unit prices per cubic yard bid therefor in the schedule, which unit prices shall include the entire cost of the excavation of the materials and of the transportation of the materials to the dam embankment: *Provided,* That all materials from borrow pits actually placed in the embankment or in backfill will again be included for payment under appropriate items of embankment construction or backfill. Measurement, for payment, of excavation in borrow pits will be made in excavation only and to the neat lines of excavations made by direction of the contracting officer.

U. S. GOVERNMENT PRINTING OFFICE: 1943